

FEDERAL MAGISTRATES COURT OF AUSTRALIA

NARAYAN v MINISTER FOR IMMIGRATION & ANOR [2008] FMCA 64

MIGRATION – Judicial review of Migration Review Tribunal decision refusing to grant a temporary spouse visa and permanent spouse visa – whether jurisdictional error.

Migration Act 1958, ss.353(2)(a), 359
Migration Regulations 1994, reg.1.15

Narayan v Minister for Immigration & Anor [2006] FMCA 658
Davis v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 686 at [35]
Bretag v Immigration Review Tribunal (Federal Court of Australia O’Loughlin J 29 November 1991 unreported)

Applicant:	AVINESH NARAYAN
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File number:	MLG 839 of 2007
Judgment of:	McInnis FM
Hearing date:	22 November 2007
Delivered at:	Melbourne
Delivered on:	24 January 2008

REPRESENTATION

Solicitor for the Applicant:	Mr T Fernandez
Solicitors for the Applicant:	T. A Fernandez
Counsel for the Respondent:	Mr C Horan
Solicitors for the Respondent:	Australian Government Solicitor

ORDERS

- (1) The Application be dismissed.
- (2) The Applicant shall pay the First Respondent's costs fixed in the sum of \$5,000.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 839 of 2007

AVINESH NARAYAN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Applicant seeks judicial review of a decision of the Migration Review Tribunal (the Tribunal) dated 15 May 2007.
2. In its decision the Tribunal affirmed a decision not to grant the Applicant a Partner (Temporary) (Class UK) visa nor a Partner (Residence) (Class BS) visa known respectively as temporary spouse visa and permanent spouse visa.
3. The Applicant is a citizen of Fiji. He arrived in Australia on 16 January 1999.
4. On 2 March 1999 the Applicant married Sandhya Gaundar (the nominator), an Australian citizen born in 1977.

5. On 11 June 1999 the nominator attended an interview at the Investigation Section of the First Respondent's Department. According to a file note (Court Book p.42) the nominator was then accompanied by a male of Indian appearance and a female of Anglo Australian appearance. Through the course of the interview with an officer of the Investigation Section the nominator signed a hand written note which relevantly stated that she wished to "*withdraw my spouse application due to relationship broken down*".

6. The file note of the meeting with the officer of the Investigation Section contains the following:

"She stated that she wished to report a contrived marriage.

I asked her to explain what she meant and who the marriage was between.

She said that she was forced into a marriage with Avinesh by her parents.

She stressed it was an arranged marriage, she didn't want to marry Avinesh but she had no choice.

...

I asked her how she met Avinesh. She said that it was all arranged through her parents. I asked how her parents met Avinesh. She said she does not know.

...

I asked have you and Avinesh ever lived together. She said yes after the marriage, but we never slept together.

I asked, are you still living together. She said no, I have moved out. He still has some of my stuff but I am too scared to go and get it"

(Court Book pp.42-45)

7. A delegate of the Minister refused to grant a temporary spouse visa to the Applicant on 21 March 2000.

8. It appears that there was some doubt as to whether the notification requirements of the *Migration Act 1958* (the Migration Act) have been complied with and accordingly, the Applicant was renotified of the

delegate's decision by letter dated 18 November 2003 (Court Book pp.55-56).

9. The Applicant, by an application dated 4 December 2003 sought review of the delegate's decision before the Migration Review Tribunal (the First Tribunal). The First Tribunal, in a decision dated 22 February 2005, affirmed the delegate's decision. The Applicant then made application for judicial review to this Court.
10. In a decision dated 5 May 2006 (*Narayan v Minister for Immigration & Anor* [2006] FMCA 658) constitutional writs were issued and the matter remitted to a differently constituted Tribunal to be determined according to law. At the commencement of the hearing I noted that I had delivered that decision and was concerned that this Court, on judicial review, would then be confronted with review of the Tribunal's decision dated 15 May 2007 involving the same Applicant. Neither party objected to this Court undertaking judicial review albeit of a differently constituted Tribunal's decision for a second time in relation to this Applicant and the delegate's refusal to grant the spousal visa. It was made clear that the Court's decision on the earlier occasion appeared to focus on a somewhat narrow issue where the First Tribunal had made a finding of "*no appropriate evidence*" where this Court found that there was indeed appropriate evidence available which should have been considered.

The Tribunal's Decision

11. In its decision the Tribunal summarised the background and the material before it under the heading "Evidence". It referred to various statutory declarations and correspondence relied upon by the Applicant both before the previous Tribunal and the current Tribunal. It noted that a hearing was conducted on 30 January 2007 at which the Applicant and friends gave evidence and that the Applicant was assisted by a migration agent at that hearing. Significant details provided in relation to the additional evidence provided at the hearing before the Tribunal. In its findings the Tribunal set out s.359A which relevantly provides as follows:

"(1) Subject to subsections (2) and (3), the Tribunal must:

(a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and

(c) invite the applicant to comment on or respond to it.

12. In relation to that issue the Tribunal relevantly stated:

“The Tribunal set out fully the relevant information in its letter of 2 February 2007 in a way that the Tribunal considered appropriate in all the circumstances. Inconsistencies between the various accounts of events provided by review application to the Department, to the Tribunal or to the Federal Magistrates Court or which were recounted by other persons to whom the review applicant described the same events are self evident on a careful reading of the Tribunal’s letter. A detailed analysis of individual inconsistencies would not have added any clarity to the invitation to comment. Rather, it is the Tribunal’s view that any attempt to do so would have carried with it the risk of rendering an already lengthy and detailed letter virtually incomprehensible.”

(Court Book p.175)

13. The Tribunal then further went on to state:

“The Tribunal takes into account that the review applicant was represented by a registered migration agent, that the migration agent had access to all Department and Tribunal files and was present at the Tribunal hearing of 30 January 2007 when the Tribunal clearly advised the review applicant of the issues before it. The review applicant was given a total of nine weeks in which to provide his comments and no objection was taken by the review applicant or his migration agent to the contents of the Tribunal’s letter until the last day of that nine week period. The Tribunal takes the view that, in all circumstances of this case, it would not have been reasonably practicable to particularise each inconsistency identified in the letter of 2 February 2007. The Tribunal takes the view that its obligations under section 359A of to ensure, as far as is reasonably practicable, that the applicant

understands why the information is relevant to the review were properly discharged in the letter of 2 February 2007.”

(Court Book pp.175-176)

14. In considering the issue of whether there was a genuine spousal relationship between the parties at the time of the application the Tribunal found as follows:

“In forming an opinion whether a married or de facto relationship exists, the Tribunal must have regard to all the relationship, including in particular the considerations set out in regulation 1.15A(3). These considerations relate to the financial aspects, the nature of the household, the social aspects and the nature of the persons’ commitment to each other. The fact that two persons have lived together for a period of six months or more is to be taken as strong evidence of a genuine and continuing relationship. In determining whether one person is the spouse of another, the Tribunal may have regard to evidence of subsequent history as an aid to determine the facts at an earlier point in time, where that subsequent history tends logically to show the existence or non existence of those facts: Bretag v MILGEA (unreported, Federal Court of Australia, O’Loughlin J, 29 November 1991).

(Court Book p.177)

15. The Tribunal then proceeded to make findings in relation to the financial aspects of the relationship. In doing so it made reference to bank statements provided to the Tribunal and then made the following significant finding:

“The Tribunal finds that there is little evidence before it that the parties combined their financial affairs at the time of application as it appears that the nominator continued to receive financial support from her family for her own use.”

(Court Book p.177)

16. The Tribunal considered the nature of the household and in relation to that issue found:

“The review applicant stated at the hearing that the flat in Indooroopilly had two bedrooms but only one of those bedrooms was furnished. The review applicant’s friends who gave evidence at the Tribunal hearing on 30 January 2007 were unable to

confirm the parties' living arrangements as it appears that neither of them visited the parties at their flat. The review applicant stated that he did the housework."

(Court Book p.177)

17. When considering the issue of the social aspects of the relationship the Tribunal noted that a video tape of the engagement and wedding ceremonies had been provided along with relevant statutory declarations. Reference was made to an undated letter in support of the visa application from the nominator's parents. In relation to that issue and others the Tribunal then relevantly states:

"The nominator's parents provided one brief, undated letter in support of the visa application. This letter indicates only that the review applicant stayed at their home before the marriage and moved into the Indooroopilly address with the nominator after the traditional marriage on 10 April 1999. No letters or declarations were provided by the nominator's siblings in support of the visa application or the review application. The review applicant stated he was unable to contact the nominator's family after he moved to Melbourne in November 2000 and had not tried to contact any other members of the nominator's family to ask for their assistance with his application.

The Tribunal gives significant weight to the lack of support for the visa application by the nominator's parents and siblings. The Tribunal notes that the nominator's parents provided information about where the parties lived, but did not provide any information about the development of the relationship before or after the marriage. The Tribunal does not accept that the review applicant was unable to contact the nominator's family after he moved to Melbourne in November 2000 because he lived at their address and would have been able to contact them by letter or telephone. The Tribunal finds that the review applicant would also have been able to contact the nominator's parents through the nominator's brother in Queensland or through other of the nominator's relatives with whom he came into contact before the relationship ended. The Tribunal infers from the review applicant's decision not to obtain supporting evidence from the nominator's family that they would have been unable or unwilling to provide any support if asked to do so.

The Tribunal accepts that the parties were married in a large traditional religious ceremony. The Tribunal notes, however, that

there is limited evidence of support for the relationship from family and friends who attended the wedding.

18. (Court Book p.178)

19. The Tribunal considered the nature of the persons' commitment to each other and recited the background chronology. In relation to that issue it relevantly states:

"The Tribunal notes, however, that no evidence was provided by family or friends in relation to the parties living arrangements at either location"

(Court Book p.179)

20. It relevantly stated:

"No evidence was provided from the nominator's family as to the degree of companionship and support between the parties at the time of application"

(Court Book p.179)

21. In relation to this issue the Tribunal then made the following significant findings and observations:

"The Tribunal observes that the nominator appears to have played the role of a traditional wife at the engagement and wedding ceremonies, but her behaviour changed dramatically when she left her parents' home only a few weeks after the marriage and moved into the Indooroopilly flat with the review applicant. The Tribunal finds that at this time the nominator began staying out with friends and openly seeing another man. The Tribunal notes that the review applicant told his employer that he suspected the nominator had married him to be free of parental control and that she was involved in a relationship with another man. The review applicant has consistently stated that the nominator's parents insisted that she make a decision about whether to accept his proposal on the day of their first meeting. The nominator herself told the Department when she withdrew her sponsorship of the visa application that her parents had forced her to marry. The nominator also told the Department that she had been involved in a relationship with another man, who accompanied her to the Department's office in June 1999, since before her marriage to the review applicant. The nominator told the Department that the review applicant was aware of her

relationship with the other man, but entered into the marriage so that he could obtain permanent residence.”

22. (Court Book p.179)

23. In dealing with the issue of whether the parties lived together or did not live separately and apart on a permanent basis the Tribunal concluded as follows:

“The Tribunal accepts that the parties both lived at the nominator’s family home between January 1999 and April 1999 and that they both lived at the Indooroopilly flat between April 1999 and June 1999. The Tribunal is not satisfied on the evidence before it, however, that the review applicant and the nominator lived together at either address as husband and wife”

24. (Court Book p.179)

25. The Tribunal then reviewed the evidence in relation to whether the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others. It took into account submissions made on behalf of the Applicant by the agent and then made the following findings:

“The Tribunal takes into account the migration agent’s submission that the review applicant’s evidence was tested at the Tribunal hearing, whereas the nominator’s advice to the Department was not able to be tested. The Tribunal observes, however, that the review applicant has given inconsistent accounts of a number of significant events which occurred during his brief marriage, which adversely affects the credibility of his claims. The Tribunal also notes that the objective evidence of the relationship, discussed above under headings relating to the definition of spouse in regulation 1.15A, also supports the nominator’s claim that her relationship with the nominator was not genuine.

The review applicant advised the Tribunal that the nominator’s family would not have prevented her from marrying someone who was not Indian because they had accepted her brother’s de-fact relationship with an Anglo-Indian girl. The tribunal does not accept that the nominator’s family’s relaxed attitude to their son’s domestic arrangements would necessarily extend to the nominator or that the nominator would be confident that her choices would also have be met with their approval. The Tribunal

finds that the nominator's sudden departure from the roles of dutiful daughter and traditional wife after she left the family home in April 1999 suggest that she may have entered into her marriage to the review applicant to liberate herself from the influence and traditional values of her family rather than because of any genuine commitment to her relationship with the review applicant. The Tribunal has already noted that the review applicant made a similar comment about the nominator's motives to his employer.

The Tribunal is unable to make a finding on the evidence before it as to whether the review applicant was aware of the nominator's relationship with Mark before he saw them together in his house in June 1999. The Tribunal is unable to make a finding on the evidence before it as to whether the parties' marriage was contrived by the review applicant to secure permanent residence. The Tribunal is satisfied on the evidence before it, however, that the nominator was involved in a romantic relationship with a man known only as Mark during her brief marriage to the review applicant, and that she did not have a commitment to a shared life with review applicant as husband and wife to the exclusion of all others at the time of application."

(Court Book p.180)

26. Ultimately the Tribunal concluded it was not satisfied "on the limited evidence before it that the relationship between the parties was genuine and continuing at the time of application." It proceeded to then find that "the review applicant was not the nominator's spouse, as defined in regulation 1.15A of the *Migration Regulations 1994* (the Regulations) at the time of the application". It found that "the review applicant does not satisfy clause 820.211 at the time of application" (Court Book p.181).

Relevant Legislation

27. Regulation 1.15A provides as follows:

Migration Regulation 1.15A

Spouse

- (1) *For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:*

- (a) *in a married relationship, as described in subregulation (1A); or*
- (b) *in a de facto relationship, as described in subregulation (2).*

(1A) Persons are in a married relationship if:

- (a) *they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (b) *the Minister is satisfied that:*
 - (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis.*

(2) Persons are in a de facto relationship if:

- (a) *they:*
 - (i) *are of opposite sexes; and*
 - (ii) *are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (iii) *are not within a relationship that is a prohibited relationship for the purposes of subsection 23B (2) of the Marriage Act 1961 ; and*
- (b) *they are of full age, that is:*
 - (i) *if either of the persons is domiciled in Australia -- both of them have turned 18; or*
 - (ii) *if neither of the persons is domiciled in Australia -- both of them have turned 16; and*
- (c) *the Minister is satisfied that:*

- (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
- (ii) *the relationship between them is genuine and continuing; and*
- (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis; and*
- (d) *subject to paragraph (e) and subregulation (2A), where either of them is an applicant for a permanent visa, a Student (Temporary) (Class TU) visa, a Partner (Provisional) (Class UF) visa, or a Partner (Temporary) (Class UK) visa -- the Minister is satisfied that, for the period of 12 months immediately preceding the date of application of the party relying on the existence of the relationship:*
 - (i) *they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them was genuine and continuing; and*
 - (iii) *they had:*
 - (A) *been living together; or*
 - (B) *not been living separately and apart on a permanent basis; and*
- (e) *where either of them is an applicant for a Resolution of Status (Residence) (Class BL) or Resolution of Status (Temporary) (Class UH) visa -- the Minister is satisfied (unless the applicant can establish compelling and compassionate circumstances for the grant of the visa) that, for the period of 12 months immediately preceding 13 June 1997:*
 - (i) *they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*

(ii) *the relationship between them was genuine and continuing; and*

(iii) *they had:*

(A) *been living together; or*

(B) *not been living separately and apart on a permanent basis.*

(2A) *Paragraph 2 (d) does not apply if:*

(a) *the applicant is applying as:*

(i) *the spouse of a person who:*

(A) *is, or was, the holder of a permanent humanitarian visa; and*

(B) *before that permanent humanitarian visa was granted, was in a relationship with the applicant that satisfies the requirements of subparagraphs (2) (c) (i), (ii) and (iii) and of which Immigration was informed before the visa was granted; or*

(ii) *a member of the family unit of a person who is an applicant for a permanent humanitarian visa; or*

(b) *the applicant can establish compelling and compassionate circumstances for the grant of the visa.*

Note permanent humanitarian visa is defined in regulation 1.03.

(3) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:*

(ad) *a Partner (Migrant) (Class BC) visa; or*

(ae) *a Partner (Provisional) (Class UF) visa; or*

(af) *a Partner (Residence) (Class BS) visa; or*

(ag) *a Partner (Temporary) (Class UK) visa;*

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

(a) *the financial aspects of the relationship, including:*

- (i) *any joint ownership of real estate or other major assets; and*
- (ii) *any joint liabilities; and*
- (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
- (iv) *whether one party to the relationship owes any legal obligation in respect of the other; and*
- (v) *the basis of any sharing of day-to-day household expenses;*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for care and support of children, if any; and*
 - (ii) *the parties' living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*

- (iv) *whether the persons see the relationship as a long-term one.*
- (4) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).*
- (5) *If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.*

The Amended Application

28. The Applicant now seeks to rely upon an Amended Application filed 8 October 2007.
29. I am satisfied that the grounds relied upon in that Amended Application have been accurately summarised in the First Respondent's contentions as follows:
- the Tribunal failed to comply with s.359A of the *Migration Act*, by failing to particularize the information that would be the reason or part of the reason for affirming the delegate's decision, and the notice was therefore "invalid";
- the Tribunal failed to give specific findings under the headings relating to "the financial aspects of the relationship" and the "the nature of the household", despite the existence of evidence;
- in relation to the social aspects of the relationship, the Tribunal's approach in giving significant weight to the lack of support by the nominator's family was "based on conjecture";
- by relying on the absence of evidence from family or friends about living arrangements, or from the nominator's family regarding the degree of companionship and support, the Tribunal failed to give a finding at the time of application;

the Tribunal failed to give reasons for its finding that it was not satisfied that the applicant and nominator lived together as husband and wife;

in relation to mutual commitment, the Tribunal failed to consider the evidence and make findings, and gave weight to “post time of application” circumstances;

the Tribunal ignored relevant material and relied on irrelevant material, including the nominator’s interview and its “own opinion” regarding the lack of support from the nominator’s family.

Submissions

30. Both parties dealt with these grounds under the following headings which I shall follow:

31. Alleged Failure to Make Findings (Grounds 3 and 4)

32. Social Aspects of the Relationship (Ground 5)

33. Nature of the Persons Commitment to each other (Ground 6)

34. Whether the Parties lived together or did not live separately and apart on a permanent basis (Ground 7)

35. Mutual Commitment to a Shared Life as Husband and Wife to the exclusion of all others (Ground 8)

36. Irrelevant Material (Ground 9)

37. Section 359A (Ground 1)

Alleged Failure to Make Findings (Grounds 3 and 4)

Applicant’s Submissions

38. It was submitted the Tribunal failed to make a finding in relation to the financial aspects of the relationship in circumstances where at the time of the application it is argued that the applicant and the nominator had been living together at the nominator’s parents’ address.

39. It was submitted that the Tribunal had looked at what was described as “post time of application criteria” and did the same when considering the nature of the household. It failed to refer to evidence for the time of application criteria and it was argued did not make a finding as required merely suggesting “there is little evidence” was not sufficient.

Respondent’s Submissions

40. The Respondent submitted the Tribunal did have regard to the financial aspects of the relationship as required by regulation 1.15A(3)(a). Reference was made to the extract of the Tribunal’s decision which appears at Court Book p.177 set out earlier in this judgment. It was argued the Tribunal considered the evidence in relation to the bank account operated between February and June 1999 and the registration of a car in joint names. It made findings that there was little evidence before it that the parties combined their financial affairs at the time of the application. It otherwise had regard to the nature of household as required by the regulations. It made findings it was submitted that “the applicant and the nominator had lived with the nominator’s family from January 1999 until April 1999 and at the Indooroopilly flat between April 1999 and June 1999. It was ultimately not satisfied on the evidence before it that the parties lived together at either address as husband and wife and it was submitted by the respondent that the Tribunal had regard to the matters prescribed by regulation 1.15A(3)(a) and (b) and made findings in relation to those matters.
41. The Respondent submitted that the Tribunal is not required to make specific findings on each and every one of the matters set out in regulation 1.15A(3). Reference was made to the decision of *Davis v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 686 at [35].
42. It was argued that although the Tribunal’s findings were directed to the time of the application, it was permitted to have regard to evidence of events and circumstances subsequent to that time which was prohibitive of the relevant facts at the time of application (see *Bretag v Immigration Review Tribunal* (Federal Court of Australia O’Loughlin J 29 November 1991 unreported) (*Bretag*).

Reasoning

43. In my view the Respondent's submissions in relation to these grounds are correct. I am satisfied the Tribunal albeit referring to findings made at the time of application was not precluded from having regard to subsequent evidence which could have prohibitive value of those facts relevant to the determination of the state of affairs at the time of application. I accept that the law in *Bretag* is correct as submitted by the Respondent.
44. A proper reading of the Tribunal's finding set out in detail earlier in this judgment reveals that it has considered the major issue raised and evidence adduced for and on behalf of the Applicant.
45. I do not accept that it has failed to make findings and nor do I accept the criticism made of the findings by the Applicant's submissions. It is ultimately a matter for the Tribunal to make an assessment of the facts and it is entitled to express that assessment in what might be otherwise regarded as somewhat pejorative terms including a concept of "little evidence".
46. Accordingly, these grounds fail.

Social aspects of the relationship (Ground 5)

Applicant's Submissions

47. It was argued that when the Tribunal made a finding that it gave significant weight to the lack of support for the Applicant by the nominated parents and siblings it erred by not providing a finding and failure to consider the available evidence that meets the requirements of reg.1.15A(3)(c). It was submitted that the Tribunal misdirected itself in relation to those considerations.

Respondent's Submissions

48. The Respondent submitted the Tribunal did consider the social aspects of the relationship as required by the regulation. It was entitled to consider the opinion of persons, friends and acquaintances about the

nature of the relationship and it was submitted it took into account the declarations and letters in support, which have been provided by the Applicant.

49. It was submitted that the “weight given to the evidence (and the absence of evidence) on this matter was a matter for the Tribunal”. The Respondent submitted there is no jurisdictional error reasoning. In my view there is no jurisdictional error arising from the weight which the Tribunal has given to the evidence when considering the voluminous material relied upon by the Applicant in relation to this issue of the social aspect of the relationship. I can see no error in the manner in which the Tribunal approached its task having regard to the obligation set out in the relevant regulation.

Nature of persons’ commitment to each other (Ground 6)

Applicant’s Submissions

50. Reference was made to the Tribunal’s finding set out earlier in this judgment where it noted that “no evidence was provided by family and friends in relation to the parties’ living arrangements at either location”. It was argued this was incorrect and reference was made to the statements provided by various witnesses. For example, it was argued that the statement provided by Agya Ram and Kushma Wati (Court Book pp.147-148) and the statement of Anish Kumar and Shobna Kumar (Court Book pp.145-146) together with the statement of the nominator’s parents (Court Book p.41) and the joint statement of the Applicant and nominator (Court Book p.25) was evidence which should have been assessed by the Tribunal when considering the commitment at the time of the application.

Respondent’s Submissions

51. It was argued by the Respondent that in assessing this criteria the Tribunal was permitted to consider evidence of subsequent events and circumstances to assist in making its assessment of the nature of the persons’ commitment to each other at the time of the application. It was open, according to the Respondent’s submissions, to the Tribunal

to “refer in this context to the absence of evidence from the nominator’s family regarding the degree of companionship and support between the parties at the time of application, the absence of evidence from the family or friends of the Applicant or nominator in relation to the living arrangements both at the nominator’s family house and at the Indooroopilly flat”.

52. That evidence, it was submitted, was relevant and inability to provide that evidence was described as a “potential gap or deficiency in overall strength of the evidence on this issue”.
53. It was argued the Tribunal’s finding in relation to the absence of evidence concerning living arrangements was specifically referring to the question of whether “the Applicant and the nominator share a bedroom, that is, lived together ‘as husband and wife’”. That issue was not addressed on behalf of the Applicant and it was argued the Tribunal’s finding regarding the absence of evidence of living arrangements should not be regarded as an incorrect finding.

Reasoning

54. This issue is no doubt a very difficult issue for Tribunals to assess. I am satisfied, however, that whilst the Tribunal had before it various statements set out earlier in the Applicant’s submissions concerning this issue that it was entitled to otherwise view the absence of evidence of living arrangements and specifically those arrangements which might reveal whether the parties shared a bedroom or as described by the Respondent had lived together “as husband and wife”. It was a matter entirely for the Tribunal to make a finding of this manner and as indicated earlier, I am satisfied that in considering circumstances at the time of the application the Tribunal as a matter of law is entitled to consider and as a matter of logic in many cases compelled to consider subsequent events and circumstances when making an assessment of this criteria.
55. I accept as submitted by the Respondent that no error arises in relation to this ground.

Whether the parties lived together or did not live separately and apart on a permanent basis (Ground 7)

Applicant's Submissions

56. Criticism was made that the Tribunal had “not indicated the evidence it took into account in not being satisfied that the review applicant and nominator lived together at either address as husband and wife”.

Respondent's Submissions

57. It was argued the Tribunal did make a finding that the Applicant and nominator lived together at the time of application namely, by accepting that they both lived at the nominator's family home between January 1999 and April 1999. The Tribunal then found it was not satisfied that the parties lived together as husband and wife. It was argued that finding was not directed to regulation 1.15A(1A)(b)(iii). Instead it was submitted it “reflected the findings made by the Tribunal in relation to the nature of the household (reg.1.15A(3)(a)), the nature of the commitment (reg.1.15A(3)(d)), and whether the applicant and the nominator had a mutual commitment to a shared life as husband and wife to the exclusion of all others (reg.1.15A(1A)(b)(i)).”
58. In support of those submissions reference was to made to the findings which recite evidence which appears in the Court Book at pages 177 to 180.

Reasoning

59. In my view although the findings of the Tribunal set out earlier in this judgment in relation to this criteria may be regarded as brief. I accept that those findings were made after a fairly detailed assessment of the matters referred to by the Respondent pursuant to the various sub-regulations and it appeared to be a lack of corroboration of the assertion by the Applicant that the parties did live together at either addresses as husband and wife. It is a matter entirely for the Tribunal to make an assessment of evidence of this kind which it has done in a manner free of error. Accordingly this ground fails.

Mutual commitment to a shared life as husband and wife to the exclusion of all others (Ground 8)

Applicant's submissions

60. The Applicant referred to the Tribunal's findings in relation to this issue set out in detail earlier in this judgment. It was argued that the Tribunal failed to consider the nominator's statement which contradicts other material relied upon by the Tribunal. It was argued a finding in the absence of evidence or taking into account irrelevant considerations constitutes jurisdictional error and it was noted that the nominator has not given evidence. Otherwise, criticism was made of the finding by the Tribunal that it gave significant weight to the "apparent lack of emotional support and commitment between the parties after they moved away from the nominator's family in April 1999" which again was criticised for taking into account what is described as "post time of application criteria". The submission was made that the Tribunal failed to take into account "the overwhelming evidence of the Applicant and his witnesses and the statement of other witnesses regarding the marriage."

Respondent's submissions

61. The Respondent submitted that the Tribunal made findings that the nominator had been involved in a romantic relationship with another man during her brief marriage to the Applicant and did not therefore have a commitment to a shared life with the Applicant as husband and wife to the exclusion of all others. Specific emphasis was placed on the concept of "mutual commitment". Reference was made to the weight given to the material and it was submitted that it was open to the Tribunal to take into account claims made by the nominator recording the file notes set out earlier in this judgment which is evidence before the Tribunal albeit not given on oath. Reliance was placed upon s.353(2)(a) of the Migration Act which provides that the Tribunal is not bound by the rules of evidence. It was otherwise argued it was for the Tribunal to decide the weight which should be given to the evidence before it. It was open to the Tribunal to make the finding in this instance.

Reasoning

62. In my view this finding was based upon the evidence which I accept as a matter of law which was capable of including material not the subject of evidence on oath. The mere fact that the submission refers to other evidence being “overwhelming” highlights the difficulties in attacking the Tribunal decision in relation to what is obviously a preference of some evidence over others or in other words in placing greater weight on part of the evidence on other evidence. There is no principle of law which requires the Tribunal to prefer evidence on oath over and above other evidence although normally one might expect evidence on oath which may be tested to have a higher value. The Tribunal, however, is entitled to take into account all the evidence before it and to make an assessment, which in this case, it has done in a manner free of error. The findings in my view were findings reasonably open to the Tribunal on the evidence before it.
63. Accordingly this ground fails.

Irrelevant material (Ground 9)

Applicant’s submissions

64. It was argued that the reference by the Tribunal to the failure of the Applicant to provide little evidence in support of the relationship by the nominator’s family was irrelevant.

Respondent’s submission

65. The Respondent submitted that a claim had made by the nominator at an interview with the Departmental officer that she had been “forced into a marriage with the Applicant by her parents”. Evidence was given, it was submitted by the Applicant at the hearing that the nominator had rejected another marriage proposal and that the nominator’s father ‘wanted her to say yes or no to the review Applicant on the day they met’. It was submitted that that evidence “was relevant to the issue of whether the Applicant and the nominator were in a married relationship within the meaning reg.1.15A(1A) at the time of the application”.

66. It was argued that it was open to the Tribunal to refer to what is described as the “absence of support for the applicant from the nominator’s family”.

Reasoning

67. In my view the Tribunal made findings in relation to this matter free of error. It was entirely open to the Tribunal to make a finding as submitted by the Respondent in relation to the absence of support for the application from the nominator’s family. I do not regard the evidence referred to by the Tribunal as being irrelevant and nor does it then therefore form a basis upon which I am able to find jurisdictional error.
68. Accordingly this ground fails

Section 359A (Ground 1)

69. It is common ground that the Tribunal sent a letter inviting comment on information pursuant to s.359A (Court Book pp.149-154). In the submissions of the Respondent are brief summaries provided of information obtained by the Tribunal of a number of sources as follows:

- *information provided by the nominator on 11 June 1999 in connection with the withdrawal of the sponsorship of the application;*
- *the letter from the Department inviting comment on the withdrawal of sponsorship, and the lack of a response from the applicant to that letter;*
- *a range of documentary evidence provided to the first Tribunal, including a statutory declaration by the applicant dated 16 December 2004, a statutory declaration by a registered nurse (Maashneel Priyanka Deo) dated 15 December 2004, a statutory declaration by a general practitioner (Dr Chandralekha Krishnamurthi) dated 15 December 2004, a letter dated 3 December 2004 from the applicant’s employer, and a letter dated 9 December 2004 from Anish Kumar and Shobnar Kumar, an undated letter from the applicant’s aunt and uncle;*

- *an application for a protection visa made by the applicant on 17 November 2000, an application for review of the refusal decision, and an application for Ministerial intervention;*
- *an application for Ministerial intervention in relation to the refusal of the spouse visa;*
- *an application for judicial review lodged in the High Court of Australia; and*
- *evidence given at the second Tribunal hearing on 30 January 2007 by the applicant, Shobra Kumar, and Anish Kumar.*

Applicant's submissions

70. It was argued that the letter from the Tribunal did not seek to specify what information fell within the exception created by s.359A(3)(b) and what information fell outside that section. Reference was made to this section and as I understand it some criticism was made by the Tribunal's reference to claims made by the nominator and it was argued the Tribunal should not be considering matters as analogists who quote "claims or counter-claims via a third party to the review". It was argued it is information that comes within the scope of s.359A.

Respondent's submissions

71. The Respondent submitted that the Court is required to determine whether there had been a failure by the Tribunal to comply with s.359A of the Migration Act which requires examination of the reasons of the Tribunal to determine any relevant "information" that was the reason or a part of the reason for the Tribunal's decision and to then determine whether that information falls within any of the exceptions set out in s.359A(4). Further, the Court should consider that "insofar as the Tribunal's decision was based on information it does not fall within any of the exceptions set out in s.359A(4)" to ascertain whether the Tribunal complied with that section in relation to that information.
72. It was submitted by the Respondent that the Tribunal's decision was based in part on the information provided by the nominator at the

interview on 11 June 1999 referred to earlier in this judgment. The information did not, it was argued, fall within any of the exceptions. The Tribunal accordingly was required to give to the Applicant particulars of that information and to do so to ensure “as far as was reasonably practicable that the Applicant understood why it was relevant to the review and to invite the Applicant to comment on it”.

73. Specific reference was made to the letter dated 2 February 2007 (Court Book pp.149-154) and the following passage:

“This information is relevant to the review because if the Tribunal accepts the claim made by the nominator on 11 June 1999 that she was forced into her marriage by her family, that your relationship with her was contrived so that you could obtain permanent residence and that she was involved in a relationship with another man throughout the marriage, it may find that the relationship between you and the nominator was not a genuine spouse relationship at the time of application. The Tribunal may find that you were not the nominator’s spouse at the time of application and may affirm the application under review without considering your claim to be a victim of domestic violence.”

74. It was submitted that the Tribunal complied with s.359A. Any reliance on inconsistencies in the accounts was not a matter which would constitute information to be provided to the Applicant according to the Respondent’s submissions.

Reasoning

75. In my view the Tribunal has complied with the requirement of s.359A. It has explained in clear terms the relevance of the information which I am satisfied is information of a kind properly relevant to the obligations which arise upon the Tribunal pursuant to s.359A. Having done that it seems to me clear that the information was a reasonable part of the reason for the Tribunal’s decision and I am satisfied did not fall within any exceptions set out in s.359A(4) of the *Migration Act*.
76. I accept the submissions of the Respondent that simply identifying inconsistencies in the material does not of itself give rise to any obligations on the part of the Tribunal pursuant to s.359A.
77. Accordingly this ground fails.

Conclusion

78. It follows for the reasons given that the application should be dismissed with costs. I should add that during the course of submissions a great deal of reference was made to the Supplementary Court Book which enclosed the transcript of evidence before the Tribunal. Those references which I have carefully considered ultimately turn on the strength of the evidence given by the Applicant and or on behalf of the Applicant before the Tribunal. They relate to issues of weight which I have referred to earlier in this judgment. The Court is not assisted by detailed reference to the transcript in the hope that the Court will somehow revisit the merits of an application when clearly the Court is not engaged in an application of this kind in merit review. To the extent that reference was made to the Supplementary Court Book it may have been relevant to earlier grounds. I conclude that those references do not assist in persuading the Court that the Tribunal has committed any jurisdictional error and nor assist in reaching the conclusions the Tribunal has made in findings not reasonably open to it on all of the evidence.
79. As indicated the appropriate order is the application be dismissed with costs.

I certify that the preceding sixty-nine (69) paragraphs are a true copy of the reasons for judgment of McInnis FM

Deputy Associate: Emily Wilson-Kwong

Date: 24 January 2008